IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1622

BATON ROUGE MARINE CONTRACTORS, INC.,
Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

CARGILL, INC.,
Intervenor Respondent.

BRIEF OF CARGILL, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

STATEMENT OF THE ISSUE

Was the U.S. Court of Appeals for the District of Columbia Circuit correct in upholding the finding of the Federal Maritime Commission that the lease

III.

REASONS FOR DENYING WRIT

A. The Decision Below Properly Affirmed The Holding, Based Upon Substantial Evidence, Of A Regulatory Agency As To Matters Particularly Within The Competence Of That Agency.

The issue presented to the FMC below, and then to the Court of Appeals, was whether the lease agreement between Cargill and the Port Commission permitted Cargill to assess the services and facilities charge against stevedores. The FMC, having first approved the lease in 1959, looked to its earlier approval as well as the record before it in the instant case in construing the scope of its 1959 approval. The approval was itself based upon an extensive record adduced at hearings in which BRMC participated as a party. The Commission found that (Pet. App. B-33):

> The lease authorized lessee to establish *any* [emphasis in original] competitive rates for storing and handling grain, and that authorization was not restricted only to those rates or charges which may have been in effect when the lease was adopted.

The Court of Appeals agreed with the FMC, and found (Pet. App. A-9–10):

> The language of the lease is broad enough to give Cargill the same charging authority in this respect as any other operator of a terminal–subject, of course, to FMC regulatory authority .... This is not a case of a fundamental change in ratemaking methodology that gives a whole new competitive

> direction to ratemaking authority. Contrast *Pacific Westbound Conference v. FMC*, 440 F.2d 1303 (5th Cir.), *cert. denied*, 404 U.S. 881 (1971) ....

B. The Decision Below Is Not In Conflict With Any Decision Of This Court.

None of the cases cited to this Court by BRMC bears upon the matters decided by the Court of Appeals and the FMC below. *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261 (1968), holds that the FMC should take a broad view of its jurisdiction under Section 15. *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), on the other hand, stands for the proposition that the FMC does not have Section 15 jurisdiction over a discrete sale of assets where there is no continuing relationship between the parties to the sale. Here there is no question that the FMC does have and has properly asserted its jurisdiction over the lease agreement under Section 15.

The remaining cases cited by BRMC which deal with the relationship between federal regulatory statutes and the antitrust laws[3] hold generally that this Court will not find an exemption from the antitrust laws merely because of the existence of a federal regulatory scheme. Stated another way, the exemption exists usually only when it has been expressly conferred pursuant to a statute, such as by Section 15. *Carnation Co. v. Pacific*

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[3] *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

Westbound Conference, 383 U.S. 213 (1966), goes a step further in construing the Section 15 antitrust exemption, and holds that joint activities subject to Section 15, but which have not been approved by the Commission under Section 15, are at large under the antitrust laws. This Court affirmed in *FMC v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), the decision of the FMC that it may not, under Section 15, approve an agreement which would constitute a *per se* violation of the antitrust laws unless the agreement provides countervailing transportation benefits. Neither of those matters was at issue in the proceeding below.

None of the cases cited above, nor any of the other cases cited by BRMC in its petition, suggest that the FMC did not properly construe the Port Commission-Cargill lease agreement under applicable law.

C. The Decision Below Is Not In Conflict With The Decision Of Any Other U.S. Circuit Court of Appeals.

BRMC represents (BRMC Petition, p. 9) that the case below "was for all purposes identical" with the *Port of Boston* case,[4] in which the U.S. Court of Appeals purported to reverse the decision of the FMC that a change in incidence of a charge assessed by an association of terminal operators allowed to establish joint rates under a Section 15 agreement did not require approval under Section 15.

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[4] *Port of Boston Marine Terminal Ass'n v. Boston Shipping Ass'n*, 420 F.2d 419 (1st Cir.), *rev'd for lack of jurisdiction sub nom. Port of Boston Marine Terminal Ass'n v. Rederi Transatlantic*, 400 U.S. 62 (1970).

In the case below, there was no joint setting of rates and no "change of incidence" in the services and facilities charge because the charge was first assessed against the stevedore, and has always been assessed against the stevedore.

Finally, the decision of the U.S. Court of Appeals in *Port of Boston* is without force or effect, because, as found by this Court, the Court of Appeals had no jurisdiction to entertain a collateral attack on the decision of the FMC.

In short, there is no conflict among the circuits as a result of the decision below.

IV.

CONCLUSION

Petitioner has failed to advance any special or important reason for which this Court should exercise its discretion to review the decision of the U.S. Court of Appeals on certiorari. The decision below affirmed the decision of a federal regulatory agency which was itself based upon substantial evidence contained in a full record. There is no decision of this Court in conflict with the decision below, nor is there any decision by any Court of Appeals on the same matter which is in conflict with the decision below. For the

foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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June 7, 1976